Case No. 48716-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

ALICE LOPEZ

Appellant,

v.

JPMORGAN CHASE & CO., ET AL.

Respondents.

BRIEF OF RESPONDENT
NORTHWEST TRUSTEE SERVICES, INC.

Submitted By:

Joshua S. Schaer, WSBA No. 31491
RCO LEGAL, P.S.
13555 S.E. 36th St., Ste. 300
Bellevue, WA 98006
(425) 457-7810

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I. STATEMENT OF THE CASE

A. Ms. Lopez Obtains a Loan and Later Defaults.

On or about November 29, 2004, in consideration for a mortgage loan, Appellant Alice Lopez executed a promissory note (the "Note") in the amount of $264,000, payable to Washington Mutual Bank. CP 221-228; *see also* CP 5 (Compl., ¶ 3.1). In the Note, Ms. Lopez agreed that if she did "not pay the full amount of each monthly payment on the date it is due," she would be in default. CP 224, ¶ 7(B).

Ms. Lopez also executed a Deed of Trust securing the Note. CP 165-192; *see also* CP 5 (Compl., ¶ 3.1). The recorded Deed of Trust encumbered a piece of real property commonly known as 14030 S.E. 35th Loop, Vancouver, WA 98683 (the "Property"). CP 168.

Ms. Lopez agreed that the Note and Deed of Trust could be sold one or more times without prior notice to her. CP 178-179, ¶ 20. She also agreed that the lender could appoint a successor trustee, who would acquire all "title, power and duties" of the original trustee. CP 181, ¶ 24.

On August 7, 2012, an Assignment of Deed of Trust in favor of Deutsche Bank National Trustee Company, as Trustee for WaMu Mortgage Pass-Through Certificate Series 2005-AR6 (the "Loan Trust") was recorded with the Clark County Auditor. CP 193; *see also* CP 6

(Compl., ¶ 3.8).

On or about August 16, 2012, as a result of Ms. Lopez's September 2011 default on payments due under the secured Note, she was sent a Notice of Default. CP 229-231.

B. A Non-Judicial Foreclosure Process Commences.

On or about October 24, 2012, an unequivocal beneficiary declaration was executed, stating that the Loan Trust was the actual holder of the Note. CP 235; *cf.* CP 9 (Compl., ¶ 3.30, asserting the Loan Trust had no right to enforce the Deed of Trust); CP 11, ¶ 4.8 (same).

On October 25, 2012, an Appointment of Successor Trustee, naming Northwest Trustee Services, Inc. ("NWTS") as Successor Trustee and vesting NWTS with the powers of the original trustee, was recorded with the Clark County Auditor. CP 232-234. This Appointment was executed by JPMorgan Chase Bank, N.A. as attorney-in-fact for the Loan Trust. *Id.*

On December 6, 2012, a Notice of Trustee's Sale was recorded with the Clark County Auditor, setting a sale date of April 5, 2013 for the Property. CP 236-240.

However, the trustee's sale did not occur as scheduled because, on April 11, 2013, Ms. Lopez filed a Chapter 13 bankruptcy petition in the

United States Bankruptcy Court for the Western District of Washington. Case No. 13-42412-BDL (Bankr. W.D. Wash.); *see also* CP 219 (Stenman Decl., at ¶ 9).

On July 1, 2013, NWTS received notification that servicing of the subject loan would transfer from Chase to Select Portfolio Servicing, Inc. ("SPS") effective August 1, 2013. CP 219 (Stenman Decl., at ¶ 10).

On September 27, 2013, an Order granting the bankruptcy trustee's motion to dismiss due to Ms. Lopez's failure to make plan payments was entered. Case No. 13-42412-BDL (Bankr. W.D. Wash.) at Dkt. 25.

C. The Foreclosure Process Continues After Ms. Lopez's First and Second Bankruptcies.

On November 7, 2013, an Amended Notice of Trustee's Sale pursuant to RCW 61.24.130(4) was recorded with the Clark County Auditor, setting a sale date of January 3, 2014 for the Property. CP 241-244.

This trustee's sale did not occur because, on January 3, 2014, Ms. Lopez filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington. Case No. 14-40014-BDL (Bankr. W.D. Wash.); CP 219 (Stenman Decl., at ¶ 12).

On May 6, 2014, Ms. Lopez received a bankruptcy discharge, and

on May 9, 2014, her case was closed. *Id.*

On May 30, 2014 another Amended Notice of Trustee's Sale pursuant to RCW 61.24.130(4) was recorded with the Clark County Auditor, setting a sale date of July 18, 2014 for the Property. CP 245-248.

This trustee's sale also did not occur because, on July 17, 2014, Ms. Lopez filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington. Case No. 14-43922-BDL (Bankr. W.D. Wash.); CP 220 (Stenman Decl., at ¶ 14). On May 28, 2015, an Order dismissing this *third* bankruptcy was entered based on Ms. Lopez's failure to make plan payments. *Id.*

D. The Foreclosure is Completed After Ms. Lopez's Third Bankruptcy.

On or about July 20, 2015, another unequivocal beneficiary declaration was executed, again stating that the Loan Trust was the actual holder of the Note, and the Note had not been "assigned or transferred to any other person or entity." CP 249.

Although NWTS had already been appointed trustee under the Deed of Trust, on August 13, 2015, a new Appointment of Successor Trustee was recorded with the Clark County Auditor. CP 250-252.

On August 28, 2015, an Amended Notice of Trustee's Sale

pursuant to RCW 61.24.130(4) was recorded with the Clark County Auditor, setting a sale date of October 16, 2015 for the Property. CP 253-257.

On October 8, 2015, Ms. Lopez filed the underlying lawsuit and moved for the issuance of a preliminary injunction. CP 3-13; CP 48-60. On November 6, 2015, the Clark County Superior Court denied Appellant's injunction request. CP 111-112.

On November 13, 2015, the Property was sold at a trustee's sale to River Stone Holdings NW, LLC as the highest bidder. CP 258-259. NWTS executed and delivered to River Stone a Trustee's Deed which was then recorded with the Clark County Auditor. *Id.*

E. The Defendants are Granted Summary Judgment.

On or about January 12, 2016, Chase and the Loan Trust moved for summary judgment on all claims in Ms. Lopez's Complaint. CP 201-211. On or about January, 14, 2016, NWTS also moved for summary judgment. CP 260-274.

On or about February 12, 2016, after hearing oral argument, the Hon. Judge Robert A. Lewis granted both CR 56 motions. CP 328-331.

Ms. Lopez then filed a timely Notice of Appeal. CP 332-337.[1]

II. RESPONSE TO ASSIGNMENT OF ERROR

1. The trial court did not err in granting NWTS' Motion for Summary Judgment based on relevant legal authorities and the evidence.[2]

III. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The trial court properly applied the holding in *Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d 509, 543, 359 P.3d 771 (2015), which finds that a promissory note's ownership is irrelevant to enforcement through non-judicial foreclosure.

2. The trial court properly applied case law in granting summary judgment because an Assignment of the Deed of Trust is not a prerequisite to foreclosure, and its existence did not give rise to liability.

3. The trial court properly applied RCW 61.24.005(2), which defines "beneficiary" as a note holder.

4. The trial court properly applied case law in granting summary judgment because Ms. Lopez lacked standing to challenge the

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[1] Subsequent to the trial court's decision, revised orders were entered which reflect the pleadings relied upon as part of the summary judgment proceeding. CP 348-349; *see also* R.A.P. 9.12.

[2] Ms. Lopez presents an Assignment of Error referencing a "Judgment and Decree of Foreclosure," but there was not a judicial foreclosure action in connection with this case. Brief of Appellant at 7. This claim of error therefore appears impertinent.

securitization of her loan – a challenge that was also outside the statute of limitations.

IV. RESPONSE ARGUMENT

A. Standard of Review.

An order granting summary judgment is reviewed *de novo*, with the Court of Appeals engaging "in the same inquiry as the trial court." *Beaupre v. Pierce Cnty.*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007). However, a ruling may be affirmed on any ground supported in the record, "even if the trial court did not consider the argument." *King Cnty. v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 170 P.3d 53 (2007).

Summary judgment is proper if the pleadings, depositions, answers to discovery, together with affidavits, show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* CR 56(c); *see also Knox v. Microsoft Corp.*, 92 Wn. App. 204, 962 P.2d 839 (1998), *rev. denied*, 137 Wn.2d 1022, 980 P.2d 1280 (1999); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991).

If the moving party demonstrates that an issue of material fact is absent, the nonmoving party must then articulate specific facts establishing a genuine issue. *See Young v. Key Pharm., Inc.,* 112 Wn.2d 216, 770 P.2d 182 (1989); *see also* CR 56(e) ("an adverse party may not

rest upon the mere allegations or denials of his pleading, but… must set forth specific facts showing that there is a genuine issue for trial.").

Unsupported conclusory allegations, or argumentative assertions, are insufficient to defeat summary judgment. *See Vacova Co., supra.* at 395, *citing Blakely v. Housing Auth. of King Cnty.*, 8 Wn. App. 204, 505 P.2d 151, *rev. denied,* 82 Wn.2d 1003 (1973), *Stringfellow v. Stringfellow,* 53 Wn.2d 639, 335 P.2d 825 (1959). "Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact." *Id., citing Grimwood v. Univ. of Puget Sound, Inc.,* 110 Wn.2d 355, 753 P.2d 517 (1988). Summary judgment is appropriate if, after considering the evidence, reasonable persons could reach only one conclusion. *See Hansen v. Friend,* 118 Wn.2d 476, 824 P.2d 483 (1992).

Here, Ms. Lopez failed to advance a genuine issue of material fact precluding NWTS from receiving summary judgment. As such, the trial court's order should be affirmed for the reasons set forth below.

B. Ms. Lopez Could Not Establish the Requisite Elements for a Consumer Protection Act Violation.

Ms. Lopez pled one claim in this case, *i.e.* a violation of the Consumer Protection Act ("CPA"), predicated on multiple theories. CP 10-12.

A CPA violation requires:

> (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.

Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 37, 204 P.3d 885 (2009), *citing Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). The failure to meet any one of these elements is fatal to the claim. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

1. NWTS Did Not Commit an Unfair or Deceptive Act.

Concerning the first prong, the CPA requires an act or practice with either: 1) "a capacity to deceive a substantial portion of the public," or 2) that "the alleged act constitutes a per se unfair trade practice." *See Saunders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249 (1989), *quoting Hangman Ridge*, *supra*.[3]

Ms. Lopez advances several arguments against the subject

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[3] "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." *Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC*, 134 Wn. App. 210, 135 P.3d 499 (2006); *see also Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 695 (2009) (to establish an unfair or deceptive act under the first prong test, there must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated act being repeated).

foreclosure's propriety which she considers to have been unfair or deceptive, namely: 1) that *Brown v. Wash. Dep't of Commerce* was wrongly decided, 2) that the Assignment of Deed of Trust was improper, 3) the loan should not have been placed in the Loan Trust and it was not a "qualified mortgage," and 4) NWTS lacked authority to act as trustee. Each issue will be addressed in turn below.

a. *Brown* is Controlling Authority.

Ms. Lopez contends that the provisions of RCW 62A.9A-203 supersede the *Brown* holding, and as a result, the Loan Trust could not effectuate foreclosure. Brief of Appellant at 13-14.

In *Brown*, the Supreme Court resolved a significant debate as to who could initiate non-judicial foreclosure under the DTA – a note holder or owner. 184 Wn.2d at 514 (finding "[t]he holder of the note satisfies these provisions and is the beneficiary because the legislature intended the beneficiary to be the party who has authority to modify and enforce the note.").

The Supreme Court specifically analyzed RCW 62A.9A-203 in the context of note ownership. *Id.* at 520 ("A purchaser of a promissory note gains 'outright ownership' of a note when the three conditions in RCW 62A.9A–203(b) are satisfied.").

But *Brown* concluded, "Washington's Uniform Commercial Code (UCC) authorizes [the] division of note ownership from note enforcement." *Id.* at 777. It should now be abundantly clear that, for purposes of non-judicial foreclosure, only "the note *holder* is the party entitled to modify and enforce the note." *Id.* at 789 (emphasis added); *see also Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Trujillo v. NWTS*, 181 Wn. App. 484, 498, 326 P.3d 768 (2014), *as modified* (Nov. 3, 2014), *rev'd on other grounds*, 183 Wn.2d 820, 355 P.3d 1100 (2015) (under the DTA, "[o]wnership of the note is not dispositive."); RCW 61.24.005(2) (defining beneficiary as the holder).

Ms. Lopez's argument is quite similar to the one raised – and rejected – in *Deutsche Bank Nat. Trust Co. v. Slotke*, 192 Wn. App. 166, 367 P.3d 600 (2016) *citing, inter alia*, *In re Butler,* 512 B.R. 643, 653 (Bankr. W.D. Wash. 2014). (the borrower alleged that "all assignments of interests in real property in Washington must 'be accomplished by deed,' " and being the note owner is "a prerequisite for foreclosure.").

Although *Slotke* addressed judicial enforcement of a Deed of Trust, Division One observed that "[e]ven in the nonjudicial foreclosure setting, recent case law confirms that the holder of a note has authority to commence a nonjudicial foreclosure." *Id.* at 174-175. This Court should

agree with that conclusion.[4]

As the non-moving party below, Ms. Lopez failed to meet her burden of demonstrating a genuine issue of material fact with respect to the Loan Trust's authority as foreclosing beneficiary.

b. NWTS Could Not be Found Liable in Connection With the Assignment.

i. NWTS Had No Role in the Assignment.

NWTS was not a party to the Assignment of Deed of Trust and did not participate in its creation. CP 193. The Assignment was recorded months prior to NWTS' appointment as trustee and subsequent involvement in the foreclosure process. *Compare* CP 193, CP 232-234.

There is no authority holding that the first element of a CPA claim can be satisfied against a non-judicial foreclosure trustee by virtue of an Assignment's existence in the public record. *Accord Zalac v. CTX Mortg. Corp.*, 2013 WL 1990728 (W.D. Wash. May 13, 2013), *aff'd* 2016 WL 146006 (9th Cir. Jan. 7, 2016); *Florez v. OneWest Bank,* 2012 WL 1118179 (W.D. Wash. Apr. 3, 2012). Thus, the Assignment's execution and recordation did not amount to unfair or deceptive act by NWTS.

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[4] Ms. Lopez does not cite to any evidence in the record to support her conclusion that the Loan Trust was not also the Note's owner. Brief of Appellant at 14-15.

ii. Ms. Lopez Also Lacked Standing to Attack the Assignment.

Second, even if NWTS was somehow connected to the Assignment, persuasive case law is in accord that Ms. Lopez lacked standing to challenge that document. *See, e.g., Brodie v. NWTS*, 2014 WL 2750123, *1 (9th Cir. Jun. 18, 2014) (a borrower cannot attack assignments as non-party to them); *Cagle v. Abacus Mortg., Inc.*, 2014 WL 4402136, **4-5 (W.D. Wash. Sept. 5, 2014) (same); *Borowski v. BNC Mortg., Inc.*, 2013 WL 4522253, *5 (W.D. Wash. Aug. 27, 2013) (a borrower must possess a genuine claim of being at risk to pay the same debt twice if the assignment stands).[5]

Indeed, courts in other jurisdictions routinely find that borrowers cannot attack the validity of assignments because they were not parties to those transactions. *See, e.g., Christie v. Bank of New York Mellon, N.A.*, 617 Fed. Appx. 680, 682 (9th Cir. 2015) ("Christie does not have standing under California law to challenge irregularities in the assignment of her Note or Deed of Trust because those instruments are negotiable and her

[5] In Washington, a borrower is never at risk of paying twice based on an assignment because the "recording of an assignment of a mortgage is not in itself notice to the mortgagor, his or her heirs, assigns or personal representatives, to invalidate a payment made by any of them to a prior holder of the mortgage." RCW 65.08.120.

obligations thereunder remain unchanged even if her creditor changes."); *Gale v. First Franklin Loan Servs.*, 599 Fed. Appx. 286, 287 (9th Cir. 2015) (borrower lacked standing to challenge an assignment during Nevada foreclosure); *Campbell v. California Reconveyance Co.*, 2012 WL 5299099, *2 (D. Ariz. Oct. 25, 2012) (same under Arizona law).

Further, Ms. Lopez agreed at the loan's origination that the Note and Deed of Trust could be sold one or more times *without prior notice* to her. CP 178-179, ¶ 20. Thus, even if the Assignment constituted a "transfer" as Ms. Lopez claims, the agreed loan terms prevent her from undermining its validity by claiming the assignment's recordation was unfair or deceptive. *Cf.* Brief of Appellant at 15.

This Court should find that Ms. Lopez lacked standing to prosecute a CPA violation based on the recording of a Deed of Trust Assignment which identified the Loan Trust as the assignee.

iii. Even if Ms. Lopez Could Attack the Assignment, That Document Does Not Convey the Right to Foreclose.

Third, an Assignment of Deed of Trust does not grant its assignee the ability to initiate foreclosure in Washington. *See, e.g., St. John v. NWTS*, 2011 WL 4543658 (W.D. Wash. Sept. 29, 2011).

Rather, such right is strictly vested with the note holder because

Washington law recognizes the general principle that a security instrument (Deed of Trust) follows the debt (Note) with or without formal assignment. *See*, *e.g.*, *Slotke*, *supra.* at 177 ("Washington courts have long recognized that the security instrument follows the note that it secures.").

Further, a creditor *may* record an assignment reflecting a transfer of beneficial interest, even though it is *not necessary* to proceed non-judicially under the DTA. *See*, *e.g.*, RCW 62A.9A-607(b); Nelson & Whitman, 1 Real Estate Finance Law § 5.28 (5th ed. 2010) ("possession of the note leaves no permanent record that future title examiners can rely upon. Hence, there is often a felt need for a recorded document [to act as] an assignment of the mortgage.").[6] Ms. Lopez's arguments suggest that taking advantage of a statutory right is a CPA violation, which cannot be correct. *See Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 13 P.3d 240 (2000) (the "CPA should not be construed to prohibit practices reasonably related to the development and preservation of business, or which are not injurious to the public interest.").

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[6] A non-judicial foreclosure of owner-occupied residential real property in Washington includes: 1) issuing a Notice of Default (RCW 61.24.030), 2) recording a Notice of Trustee's Sale (RCW 61.24.040), and 3) delivery and recording a Trustee's Deed to the purchaser at sale (RCW 61.24.050). Noticeably absent is any requirement to execute or record an Assignment of Deed of Trust.

In sum, the trial court acted properly to reject Ms. Lopez's theory of CPA liability in connection with the Assignment of Deed of Trust.

c. The CPA Claim was Time-Barred as to Allegations Pertaining to "Placement of a Loan in the Trust."

CPA claims have a four-year statute of limitations. RCW 19.86.120; *see also Lapinski v. Bank of Am., N.A.*, 2014 WL 347274, *6 (W.D. Wash. Jan. 30, 2014). "A statute-of-limitations defense may be raised if 'it is apparent from the face of the complaint' that the limitations period has expired." *Stephenson v. First Am. Title Ins. Co.*, 2014 WL 2894692, *2 (W.D. Wash. Jun. 25, 2014), *quoting Seven Arts Filmed Entertainment Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1254 (9th Cir. 2013).

Traditionally, a cause of action accrues when the alleged harm occurs, regardless of whether the injured party knows he or she has the right to seek relief in the courts. *See Unisys Corp. v. Senn*, 99 Wn. App. 391, 398, 994 P.2d 244 (2000); *Malnar v. Carlson*, 128 Wn.2d 521, 529, 910 P.2d 455 (1996) (cause accrues when a party can apply to the court for relief); *see also, e.g., Dees v. Allstate Ins. Co.*, 933 F. Supp. 2d 1299, 1310 (W.D. Wash. 2013) (rejecting CPA liability for "any alleged unfair or deceptive practice" occurring more than four years prior to suit); *Pruss*

v. Bank of Am., N.A., 2013 WL 5913431, *5 (W.D. Wash. Nov. 1, 2013) (same).

In *Shepard v. Holmes*, Division Three cited an older State Supreme Court decision concerning a situation where facts constituting the plaintiff's claim were easily ascertainable and therefore resulted in a statute of limitations bar:

> [t]he public record serves as 'constructive notice to all the world of its contents'.... '[T]he defrauded party cannot be heard to say that he has not discovered the facts showing the fraud within the limit of the statute if the facts should have been discovered prior to that time by anyone exercising a reasonable amount of diligence.'

185 Wn. App. 730, 345 P.3d 786 (2014), *quoting Davis v. Rogers,* 128 Wash. 231, 236, 222 P. 499 (1924).

Here, information relating to the Loan Trust was easily ascertainable to Ms. Lopez, as trust documents have long been publicly available from the Securities and Exchange Commission. *See* http://www.sec.gov/edgar/searchedgar/companysearch.html (EDGAR search).[7] Ms. Lopez was time-barred from raising a CPA claim with respect to the April 2005 "closing date" of the Loan Trust. *Cf.* Brief of

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[7] *See also* http://en.wikipedia.org/wiki/EDGAR ("Companies were phased in to EDGAR filing over a three-year period, ending 6 May 1996. As of that date, all public domestic companies were required to submit their filings via EDGAR, except for hardcopy paper filings, which were allowed under a hardship exemption.").

Appellant at 16.

Moreover, NWTS could not have committed unfair or deceptive acts that Ms. Lopez ascribes strictly to the Loan Trust based on its "closing date" when NWTS did not participate in the foreclosure process until years later. *Id.*

d. Ms. Lopez Could Not Attack the Loan's Securitization.

Much like the Assignment, Ms. Lopez lacked standing to disavow the securitization of the subject loan. *See Slotke*, *supra.* at 177, n. 39, *citing In re Nordeen,* 495 B.R. 468, 480 (B.A.P. 9th Cir. 2013); *see also, e.g., Alexander v. Wells Fargo Bank, N.A.*, 2015 WL 5123922, *3 (W.D. Wash. Sept. 1, 2015); *Ogorsolka v. Resid. Credit Solutions, Inc.*, 2014 WL 2860742, *3 (W.D. Wash. Jun. 23, 2014); *Sidorenko v. Nat'l City Mortg. Co.*, 2012 WL 3877749, *2 (W.D. Wash. Sept. 6, 2012) ("a loans alleged securitization has no bearing on whether a party may enforce the Note and Deed of Trust"); *Frazer v. Deutsche Bank Nat'l Trust Co.*, 2012 WL 1821386, *2 (W.D. Wash. May 18, 2012) ("Plaintiffs are not parties to the pooling and servicing agreement and present no authority suggesting standing to challenge it.").

Consequently, arguments pertaining to an alleged faulty or

fraudulent securitization have been largely rejected given that a borrower is neither a party, nor a third-party beneficiary, to a loan's purchase and sale agreement. *See e.g., Benoist v. U.S. Bank Nat'l Ass'n*, 2012 WL 3202180, *5 (D. Haw. Aug. 3, 2012); *Bascos v. Fed. Home Loan Mortg. Corp.*, 2011 WL 3157063 (C.D. Cal. Jul. 22, 2011); *Greene v. Home Loan Servs., Inc.*, 2010 WL 3749243, *4 (D. Minn. Sept. 21, 2010).

Further, even if the Court accepted Ms. Lopez's argument at face value that the Pooling and Servicing Agreement ("PSA") was not followed, it does not impact her obligation to fulfill the terms of the Note. Brief of Appellant at 16; *cf., e.g., Citibank, N.A. v. Wilbern*, 2013 WL 1283802 (N.D. Ill. Mar. 26, 2013) ("Compliance or noncompliance with the trust agreement is not relevant to the validity of a loan's assignment…."); *Bank of New York Mellon v. Fleming*, 2013 WL 241153 (N.D. Ill. Jan. 18, 2013) ("Even if the assignments violated the PSA, that had no effect on [borrowers'] obligations under the note and mortgage, as the PSA was a contract entirely separate from the note and mortgage."); *Henkels v. J.P. Morgan Chase*, 2011 WL 2357874, *7 (D. Ariz. Jun. 14, 2011) (same). Thus, nothing about securitization of the loan affects the validity of its enforcement by the Loan Trust. *See, e.g., McGough v. Wells Fargo Bank, N.A.*, 2012 WL 2277931, *4 (N.D. Cal. Jun. 18, 2012)

("Theories that securitization undermines the lender's right to foreclose on a property have been rejected by the courts."); *Reyes v. GMAC Mortg. LLC*, 2011 WL 1322775, *2 (D. Nev. Apr. 5, 2011) ("securitization of a loan does not in fact alter or affect the legal beneficiary's standing to enforce the deed of trust"); *Hafiz v. Greenpoint Mortg. Funding, Inc.*, 652 F.Supp.2d 1039, 1043 (N.D. Cal. 2009) (rejecting claim that a power of sale was lost by assignment of note to a trust pool).

Finally, Ms. Lopez's contentions that the loan was not a "qualified mortgage" are irrelevant to the claims presented. Brief of Appellants at 19-21, *citing* 26 U.S.C. § 860G(a)(3)(A)(i, ii). The stated section pertains to the *taxation* of real estate mortgage investment conduits, or REMICs. *Id.*; *see also* 26 U.S.C. § 860A(a) ("Except as otherwise provided in this part, a REMIC shall not be subject to taxation under this subtitle."). Whether the subject loan had been considered a "qualified mortgage" according to 26 U.S.C. § 860G for tax purposes is immaterial to the Loan Trust's status as beneficiary under Washington law or the validity of foreclosure on the Property after Ms. Lopez's default.

As such, the trial court soundly rejected Ms. Lopez's allegations related to NWTS conducting a foreclosure in the Loan Trust's name.

e. NWTS Was Lawfully Appointed.

Ms. Lopez lastly argues that NWTS did not have legal authority to act upon its appointment as the successor trustee of the Deed of Trust, and this amounted to a DTA violation constituting an unfair or deceptive act. Brief of Appellant at 18.

i. Ms. Lopez Could Not Challenge the Appointment of Successor Trustee.

First, just as with the Assignment addressed above, Ms. Lopez's Complaint could not legitimately assert a defect with the Appointment of Successor Trustee.

It is important to note that the appointment of a successor trustee is an event which is *not* a prerequisite to foreclosure under the DTA. An appointment occurs solely by virtue of the rights afforded to a lender, as agreed to by a borrower like Ms. Lopez, in the Deed of Trust. *Compare* CP 10 (Compl., ¶ 4.2); CP 181, ¶ 24 (the Deed of Trust permitted a potential trustee substitution at origination). A substitution can occur whether there is a foreclosure or not.

The United States District Court for the Eastern District of Washington has found that a borrower:

> [d]oes not have standing to contest the appointment [of successor trustee]. Because Plaintiff is neither a party to nor a third-party

> beneficiary of this agreement, he could not have been injured by the alleged fraud.

Brophy v. JPMorgan Chase Bank, 2013 WL 4048535, *7 (E.D. Wash. Aug. 9, 2013), *citing Javaheri v. JPMorgan Chase Bank,* 2012 WL 3426278 (C.D. Cal., Aug. 13, 2012); *see also Brophy v. JPMorgan Chase Bank*, 2015 WL 1439346, *5 (E.D. Wash. Mar. 27, 2015) ("Whatever claim Plaintiffs have regarding the alleged fraudulent execution of the appointment of successor trustee can only be pursued against Defendant JPMorgan Chase, not Defendant NWTS. The DTA does not impose a duty upon Defendant NWTS to verify the validity of an appointment."); *Brodie v. NWTS*, 2012 WL 6192723, *3 (E.D. Wash. Dec. 12, 2012), *aff'd*, 2014 WL 2750123 (9th Cir. Jun. 18, 2014) (dismissing challenge to trustee's appointment; "[a]t bottom, the alleged misconduct had no bearing whatsoever upon Plaintiff's obligation to make her… payments."). The Western District of Washington also adopted similar reasoning in *Cagle v. Abacus Mortg., Inc.*, *supra*. at *5, and NWTS urges this Court to hold likewise.

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ii. Ms. Lopez Did Not Plead Prejudice Resulting From the Appointment or NWTS' Later Actions.

Second, Washington law mandates a showing of prejudice must be made before a court will entertain DTA process-based challenges. *See Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007) (a borrower who cannot cure default is economically indifferent to procedural defects in the foreclosure process and suffers no prejudice); *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 119 P.3d 884 (2005), *citing Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988). While the DTA is a strictly construed statute, it is not a strict-liability statute. Prejudice must be shown to demonstrate liability predicated on a DTA violation.

When opposing Defendants' summary judgment motions, Ms. Lopez did not articulate that she suffered prejudice as a result of either the Appointment itself or NWTS' subsequent issuance of foreclosure notices. *See, e.g., Meyer v. U.S. Bank*, 530 B.R. 767 (W.D. Wash. Apr. 10, 2015), *reconsid. denied* (Jun. 9, 2015) (no prejudice shown).

Rather, her position hinges on the incorrect notion that foreclosure could not proceed on behalf of the Loan Trust. Brief of Appellant at 18 (alleging the "ineffectiveness of the FDIC's assignment…."); *cf.* CP 235,

CP 249 (NWTS possessed two unambiguous, valid beneficiary declarations averring to the Loan Trust's Note holder status prior to each recorded Appointment).

Consequently, Ms. Lopez was unable to sufficiently establish unfair or deceptive acts due to material defects in the Appointment, and the trial court did not err by resolving her CPA claim in NWTS' favor.

2. Ms. Lopez Does Not Address the CPA's Public Interest Element.

As to the public interest element, "each private plaintiff" bringing a CPA claim must show "the public interest would be served." *Hangman Ridge, supra.* at 784. It is "the likelihood that additional plaintiffs have been or will be injured in *exactly the same fashion* that changes a factual pattern from a private dispute to one that affects the public interest." *Id.* at 790 (emphasis added); *see also McRae v. Bolstad,* 101 Wn.2d 161, 676 P.2d 496 (1984); *Tran v. Bank of Am.,* 2013 WL 64770 (W.D. Wash. Jan. 4, 2013) ("[t]he public interest in a private dispute is not inherent.").

Ms. Lopez's opposition to NWTS' summary judgment motion failed to articulate how NWTS' role in the subject foreclosure resulted in actions likely injurious to the broader public. Rather, she merely asserted, without support, that because "Defendants each conduct thousands of

foreclosures each year… their actions unquestionably are capable of being repeated." CP 296 (Response Brief at 21).

However, each of the acts alleged as to NWTS exclusively related to conduct directed at Ms. Lopez personally, *i.e.*, whether certain DTA procedures in a particular foreclosure were followed. This purported conduct did not, and could not, have the capacity to deceive other individuals, let alone a substantial portion of the public. *Accord Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 816, 239 P.3d 602 (2010), *citing Burns v. McClinton,* 135 Wn. App. 285, 290-91, 143 P.3d 630 (2006) (CPA claim defeated because of no evidence that Wells Fargo's actions had "the capacity to deceive a large portion of the public."); *see also Westview Investments, Ltd. v. U.S. Bank Nat. Ass'n*, 133 Wn. App. 835, 855, 138 P.3d 638 (2006); *but see Bain*, *supra.* at 118 ("*considerable evidence* that MERS is involved with an enormous number of mortgages in the country (and our state), perhaps as many as *half nationwide*.") (emphasis added).

By not providing evidence to support the public interest prong under *Hangman Ridge*, Ms. Lopez was unable maintain a requisite element of the CPA against NWTS.

3. NWTS Did Not Cause Injury to Ms. Lopez.

An award under the CPA is strictly limited to damage "in… business or property…." RCW 19.86.090, *see also Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009). This limitation excludes personal injury, "mental distress, embarrassment, and inconvenience." *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014), *citing Panag*, *supra.* at 57. The financial consequences of such personal injuries are also excluded. *Id.*, *citing Ambach* at 178; *see also Wash. State Physicians Ins. Exch. & Ass'n v. Fisons,* 122 Wn.2d 299, 858 P.2d 1054 (1993) (lost wages or personal injuries, including pain and suffering, are not compensable under the CPA); *Demopolis v. Galvin,* 57 Wn. App. 47, 786 P.2d 804 (1990) (litigation expenses are not an "injury" under the CPA); *Thurman v. Wells Fargo Home Mortg.*, 2013 WL 3977622 (W.D. Wash. Aug. 2, 2013) (citations omitted).

Moreover, a plaintiff is also limited to recovery for injuries that she can demonstrate were proximately caused by unfair or deceptive practices. *See*, *e.g.*, *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82, 170 P.3d 10 (2007) (A plaintiff must prove that the "injury complained of… would not have happened" if not for defendant's acts).

This means there must be a causal link between the alleged deceptive practice or misrepresentation and the purported injury. *See*, *e.g.*, *Hangman Ridge*, *supra* at 793; *Panag*, *supra*. at 64 (if an expense would have been incurred regardless of whether a violation existed, causation is not established); *Blair v. NWTS*, 193 Wn. App. 18, 372 P.3d 127 (2016) (no causation found; "[a] borrower must prove more than the trustee violated the statute, and he was injured. A borrower must prove, but for the violation of the statute, he would not have been injured."); *see also Bain*, *supra*. at 119, *citing Bradford v. HSBC Mortg. Corp.*, 799 F.Supp.2d 625 (E.D. Va. 2011).[8]

As the Ninth Circuit Court of Appeals held concerning a CPA claim in the foreclosure context:

> Plaintiffs' foreclosure was not caused by a violation of the DTA because Guild [the foreclosing entity] was both the note holder and the beneficiary when it initiated foreclosure proceedings, and therefore the 'cause' prong of the CPA is not satisfied.

Bhatti v. Guild Mortg. Co., 2013 WL 6773673, *3 (9th Cir. Dec. 24, 2013).

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[8] In *Bradford*, three different companies attempted to foreclose on a property after the borrower attempted to rescind a mortgage under the Truth in Lending Act. All three companies claimed to hold the note. Nothing like the harm in *Bradford* was alleged here.

In the same way, Ms. Lopez could not ascribe any injuries to NWTS' issuance of foreclosure notices. *Accord, e.g., Massey v. BAC Home Loans Serv. LP*, 2013 WL 6825309 (W.D. Wash. Dec. 23, 2013), *citing Babrauskas v. Paramount Equity Mortg.*, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) (plaintiff's failure to meet obligation "is the 'but for' cause of the default" and foreclosure), *McCrorey v. Fed. Nat. Mortg. Ass'n*, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013) (plaintiffs' failure to pay led to default and foreclosure).[9]

Ms. Lopez's Complaint did not describe how the issuance of foreclosure notices – generated as a result of their default on the loan – caused injury to her. Likewise, Ms. Lopez did not suggest that foreclosure suddenly commenced for no valid reason whatsoever, or that she was at risk of making loan payments to multiple parties.[10]

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[9] Numerous courts elsewhere have also recognized that a borrower's default, resulting in foreclosure, cannot cause claimed injuries. *See, e.g., Junod v. MERS, Inc.*, 584 F. App'x 465, 469 (9th Cir. 2014) ("The flaw in this claim is that while the loss of a home to foreclosure is most likely an injury in fact, causation has not been demonstrated. The Junods' default triggered the foreclosure of their home."); *Contreras v. JPMorgan Chase*, 2014 WL 4247732, *10 (C.D. Cal. Aug. 28, 2014) ("Contreras's default caused the foreclosure, and because his default occurred prior to the allegedly unlawful acts leading to the foreclosure, those acts could not be the cause of his economic loss.").

[10] Quite the opposite: Ms. Lopez contended "somebody" may have the right to foreclose…," but she could not explain who else besides the Loan Trust that might be. CP 297 (Response Brief at 22).

Instead, Ms. Lopez pled a boilerplate conclusion that she "suffered injury due to the distractions and loss of time to pursue business and personal activities necessitated by the need to address [Defendants' conduct]...." CP 11 (Compl., ¶ 4.7).[11] But just as with the aforementioned criteria for a CPA violation, this bare statement alone did not satisfy the causation and injury prongs of the applicable *Hangman Ridge* test, and the trial court was within its discretion to grant summary judgment.

IV. CONCLUSION

The record shows that NWTS did not participate in the Assignment of Deed of Trust, which by itself is immaterial to the authority to foreclose non-judicially in this state. NWTS also did not self-appoint to obtain the capacity of successor trustee. In fact, Ms. Lopez agreed that all these actions could occur upon the commencement of foreclosure when she received the benefit of a mortgage loan.

Additionally, NWTS came to possess two unambiguous declarations of the Loan Trust's note holder status. The evidence in this

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[11] This mantra contending the existence of injury has been pled and rejected in other cases. *See Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wn. App. 58, 358 P.3d 1204 (2015) (Complaint contained same verbiage).

case therefore compels the conclusion that NWTS' actions were authorized and proper.

For these reasons, the trial court's decision to grant summary judgment to NWTS from the action should be affirmed.

DATED this 4th day of October, 2016.

RCO LEGAL, P.S.

By: /s/ Joshua S. Schaer
Joshua S. Schaer, WSBA #31491
Attorneys for Respondent Northwest Trustee Services, Inc.

Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. On October 4, 2016 I caused a copy of the **Brief of Respondent Northwest Trustee Services, Inc.** to be served to the following in the manner noted below:

James A. Wexler Attorney at Law 2025 201st Ave. SE Sammamish, WA 98705 Attorneys for Appellant	[**X**] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [**X**] Email (by agreement of the parties) wex@seanet.com
Amy Edwards Stoel Rives, LLP 600 University St., Suite 3600 Seattle, WA 98101 Attorneys for Respondents Deutsche Bank National Trust Company as Trustee for WAMU Mortgage Pass-Through Certificates Series 2005-AR6, and JPMorgan Chase Bank, N.A.	[**X**] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [**X**] Email (by agreement of the parties) amy.edwards@stoel.com

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 4th day of October, 2016.

Kristine Stephan, Paralegal

RCO LEGAL PS

October 04, 2016 - 2:11 PM

Transmittal Letter

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Brief of Respondent Northwest Trustee Services, Inc.

Sender Name: Kristi Stephan - Email: kstephan@rcolegal.com

A copy of this document has been emailed to the following addresses:

wex@seanet.com
amy.edwards@stoel.com
jschaer@rcolegal.com